IN THE

Supreme Court of the United States

October Term, 1947.

No. 139.

JOSEPH ESTIN,

Petitioner,

AGAINST

GERTRUDE ESTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

JAMES G. PURDY,
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Counsel.

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CASES CITED.

CONSTITUTION AND STATUTES.

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On Writ of Certiorari to the Court of Appeals of the State of New York.

Opinions Below.

The opinion of the New York Court of Appeals is reported in 296 N. Y. 308. It is printed at R. 97-101.

No opinion was written by the Appellate Division of the Supreme Court.

The opinion of the New York Supreme Court (Mr. Justice Hallinan) is not reported officially. It is reported in 63 N. Y. Sup. 2d 476, and is printed at R. 81-92.

The Constitution of the United States Is Involved.

The ground on which the jurisdiction of this Court is invoked is the failure of the New York Court of Appeals to give the full faith and credit required by Article IV, Section 1, of the United States Constitution, to the divorce

decree obtained by the petitioner against the respondent in Nevada by refusing to hold that the obligation of petitioner to comply with the support provision of a separation decree obtained by the respondent in the State of New York was terminated by the valid divorce decree subsequently obtained by him in Nevada.

Jurisdiction.

The petitioner's petition for a Writ of Certiorari to the New York Court of Appeals was denied by this Court on October 13, 1947. On a petition for a rehearing, the order of October 13, 1947, was vacated, and the Writ of Certiorari was granted and this action consolidated with *Kreiger* v. *Kreiger,* October Term, 1947, No. 371, by order made December 15, 1947 (R. 104). The remittitur of the New York Court of Appeals is dated April 18, 1947 (R. 96) and jurisdiction was invoked under Section 237(B) of the Judicial Code as amended February 13, 1925.

Statement.

The facts material to the consideration of the question presented are:

In October 1943, a decree for the plaintiff was made in this separation action by the Supreme Court of the State of New York, and in it awarded the respondent $180 per month for her maintenance and support (R. 12).

Mr. Estin moved to Nevada in January 1944 (R. 25). He has ever since resided and voted there (R. 25, 56), maintained his bank account there (R. 25), filed his income tax returns from there (R. 25, 52-55), paid poll taxes (R. 25, 55, 56) and personal property taxes there (R. 26, 56, 57). His automobile licenses were issued to him as a resident of Washoe County (R. 26, 58).

On May 24, 1945, the petitioner obtained a decree of divorce in the Second Judicial District Court of the State

of Nevada in and for the County of Washoe, upon the ground of three years continuous separation without cohabitation (R. 40), after that Court had been advised of the New York decree (R. 48).

Mrs. Estin was served with a copy of the summons and certified copy of the complaint in New York City but did not appear in the action and defaulted (R. 43).

The petitioner ceased paying the said alimony on May 24, 1945 (R. 8, 9), and the respondent in 1946 moved for a money judgment for the amount of the arrears (R. 7, 8). This motion was opposed by the petitioner, based upon his divorce decree in Nevada, supplemented by further proof of his domicile there (R. 30 to 52, 24, 27, 28, 29).

Upon similar papers, the petitioner moved to modify the judgment in the New York separation action by striking out the provision thereof for the payment of money by the petitioner to the respondent for her support and maintenance (R. 67, 68). The New York Supreme Court, Queens County, in an opinion (R. 81 to 91 inc.) granted the respondent's motion and denied the petitioner's motion.

The order and judgment (R. 4 to 7) were affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, by order dated November 12, 1946 (R. 92), and judgment was entered thereon dated November 20, 1946 (R. 93). On appeal to the New York Court of Appeals the judgment was affirmed by Remittitur dated April 18, 1947 (R. 96), upon an opinion by Chief Judge Loughran (R. 97 to 101 inc.). A Writ of Certiorari to the Court of Appeals was granted by this Court on the 15th day of December, 1947.

The parties had no children (R. 48).

Summary of Argument.

1. The petitioner became a resident of Nevada before instituting the divorce action in that State, exercised and enjoyed all the rights and privileges of citizens domiciled in that State, such as voting, paying taxes, owning and maintaining his home there, where he still resides.

2. The divorce decree obtained by the petitioner in the Nevada Court was recognized as valid by the New York Court and terminated the status of petitioner as husband and wife.

3. The alimony provisions of the prior separation decree obtained in the New York Supreme Court by respondent against petitioner was based upon the common law obligation of a husband to support his wife during the time they are husband and wife, and created for the respondent no new rights and imposed upon the petitioner no new obligations.

4. In New York State the alimony provision of a separation decree is a procedural remedy provided by statute ancillary thereto and depending for validity thereon, designed to make more easy the enforcement of the husband's common law duty to support his wife while she remains his wife by measuring that duty in terms of dollars. In New York alimony may not be awarded a wife in such an action unless she wins a separation.

5. The respondent had no vested interest in the support provision of her New York separation decree; the New York Courts had power to modify that provision both as to future and past-due alimony.

6. No common law power exists in the New York Courts to compel a man to support his ex-wife and there is no such obligation created by statute applicable here.

7. The Nevada divorce decree, by ending the marriage between the petitioner and respondent, terminated the former's obligation to make the required alimony payments to the latter; that obligation, measuring his common law duty to support his wife, ended when the respondent ceased to be his wife, and was not continued or re-created by statute.

8. The case of *Barber* v. *Barber*, 21 How. 582, relied on by the New York Court of Appeals in *Estin* v. *Estin*, and the cases of *Bassett* v. *Bassett* and *Durlacher* v. *Durlacher*, relied upon by the New York Supreme Court in that case, are not authorities supporting the judgment of the New York Court of Appeals here under review.

POINT I.

The petitioner obtained a bona fide domicile in Nevada before the commencement of his divorce action and continued to maintain it.

The facts recited in Mr. Estin's affidavit submitted in opposition to the respondent's motion for a money judgment and in support of his motion to strike the alimony provision from the New York decree clearly and without suspicion established that the petitioner had become domiciled in Nevada in January 1944 (R. 25) over fifteen months before filing his divorce action (R. 33).

He has ever since exercised all the rights and privileges of a Nevada resident, registering, voting, paying taxes, etc. (R. 25, 26, 52 to 58).

He was acknowledged to be a Nevada resident by the New York Supreme Court (R. 86).

POINT II.

Petitioner's divorce decree granted by the Nevada court is valid, was recognized as such by the New York courts, and terminated the status of petitioner and respondent as husband and wife.

This cause comes here with the full recognition by the New York Courts of the validity of petitioner's divorce decree made in Nevada.

The uncontroverted facts contained in Mr. Estin's affidavit (R. 5, 6, 7) are complete proof that Mr. Estin was and is *bona fide* domiciled in Nevada and that the Nevada Court thereby obtained full jurisdiction to make the divorce decree.

Upon these facts as to domicile, the New York Court of Appeals said in this case (296 N. Y. 308):

> "We have then this situation: The full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage; and the only remaining question is whether the Nevada decree must also be taken to have cancelled the alimony provision made for the wife through the prior judgment in this New York separation action" (R. 99).

POINT III.

The alimony provision of the separation decree here

(a) Was based upon the common law obligation of a husband to support his wife during the time that they are husband and wife; and

(b) Created for the wife no new rights and imposed upon the husband no additional obligations.

By making clear the legal background of the alimony provisions of separation decrees, their purpose and their limitations, we believe that the principles of law applicable to this case, as are hereinafter presented, will be more clearly apparent.

This point will be considered under the above subdivisions.

(a) *The alimony provision of this separation decree is based upon a continuance of the status of husband and wife and the common law liability of the petitioner to support the respondent while she remains his wife.*

The English Courts have recognized this statement of the law for many years.

In *Harris* v. *Morris* (1801), 4 Espinasse's Reports 41, we read:

> "the law has said that where a man turns his wife out of doors, he sends her with credit for her reasonable expenses."

The Probate, Divorce and Admiralty division, in *Dean* v. *Dean*, 129 Law Times Reports by Sir Henry Duke, P., cited that case and said (p. 705):

> "The wife's right to maintenance is not dependent on ecclesiastical law or or the Matrimonial

> Causes Act 1857, but is rooted in the Common Law. She is entitled to pledge her husband's credit for necessaries, *i. e.,* for maintenance suitable to her station in life, which is that of her husband. I refer to cases such as *Harris* v. *Morris* (1801, 4 Esp. 41) and *Wilson* v. *Glossep* (58 L. T. Rep. 707; 20 Q. B. Div. 345). That is the Common Law. A deserted wife left without means suitable to her position has a right, and is of necessity authorized, as her husband's agent, to pledge his credit for the purpose of providing herself with maintenance according to her husband's station. This wife was and remains deserted. The effect of the decree of Judicial separation is to substitute a fixed income for that mode of maintenance by pledging her husband's credit for necessaries according to his position, which the Common Law gave her."

In *Forth* v. *Forth* (1867) 16 Law Times Reports 574, Wilde, J. O. said:

> "I have already pointed out in *Prichard* v. *Prichard* (*ubi sup.*) that in my opinion, although the Court by a decree of Judicial separation gives a legal warranty to a wife and husband to live apart, still they remain husband and wife, and that while they remain so, the obligation also remains on the husband of contributing to the support of the wife."

The New York Court of Appeals adopted this view in *Romaine* v. *Chauncey,* 129 N. Y. 566 at 569, when Judge Andrew said in discussing the purpose of alimony:

> "Alimony, as we all understand, is an allowance for support and maintenance, having no other purpose and provided for no other object."

In *Faversham* v. *Faversham,* 161 N. Y. App. Div. 521 at 524, the opinion says:

> "The right to receive alimony, as it is understood in this State, is clearly a personal right, arising out of the domestic relations * * *."

While the *Faversham* case considered alimony awarded by a divorce decree, it recognized that this was simply a re-creation upon divorce of the husband's prior common law duty to support the wife.

This same principle has been enunciated by this Court in many cases. We will cite and quote from two.

In *Audobon* v. *Shufelt,* 181 U. S. 575, at 577, this Court said:

> "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the Court of appropriate jurisdiction."

In *Wetmore* v. *Markoe,* 196 U. S. 68, this Court said at page 74:

> "We think the reasoning of the *Audobon* case recognized the doctrine that a decree awarding alimony to the wife or children or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children."

and at page 77 further said:

> "While it is true in this case the obligation has become fixed by an unalterable decree, so far as the

> amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them as against the husband and father."

(b) *The alimony provision creates for the wife no additional rights and imposes upon the husband no additional obligations.*

In *Faversham* v. *Faversham,* 161 N. Y. App. Div. 521 (*supra*), at 523, the Court also said:

> "A decree for alimony therefore does not create but rather defines and makes specific the husband's original obligation * * * it measures and makes specific and certain his obligation, but it does not change the character of that obligation which is purely personal and solely for the support of the wife."

and see:

Wetmore v. *Markoe* (*supra*);
Audobon v. *Shufelt* (*supra*);
Romaine v. *Chauncey* (*supra*).

These cases make clear that the allowance of alimony in a separation decree creates no additional rights for the wife and imposes no additional duty upon the husband. The Court measures the existing duty of the husband to support his wife so long as they remain husband and wife in terms of dollars, thus making it easier for the wife to compel the husband to fulfill his duty to support her imposed upon him by law. It makes a simplified method of procedure to enforce that right.

The *Faversham* case considered alimony awarded by a divorce decree, but the underlying principle is the same, a man's duty to support his wife, a duty which ended with a divorce but which in New York is continued by a statutory creation of the same duty where the wife obtains a divorce. As noted later on this brief, there is no duty upon a husband to support his ex-wife in New York except in three cases (p. 24), all non-existent here.

At common law the termination of the status of husband and wife ended the duty of the husband to support his wife, and the above authorities make clear that the alimony provisions of a separation decree do not extend beyond that limitation.

POINT IV.

The inclusion of the alimony provision in the decree here is a procedural remedy provided by statute ancillary thereto and depending for validity thereon, designed to make more easy the enforcement of the husband's common law duty to support his wife while she remains his wife.

In New York State an award of alimony pursuant to Section 1170 of the Civil Practice Act (printed at page 14 of this brief) is incidental only to a decree of divorce or separation granted to the wife. If she does not win a decree, she may not in that action have a decree or judgment for support only.

> *Johnson* v. *Johnson*, 206 N. Y. 561;
> *Ainsworth* v. *Ainsworth*, 239 N. Y. App. Div. 258;
> *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456, 461, 465.

We have quoted *Romaine* v. *Chauncey*, 129 N. Y. 566 (*supra*), at 569, on page 8 of this brief, and at page 570 the opinion continues:

> "and when awarded, it (the alimony award) is not so much in the nature of a payment of a debt as in that of the performance of a duty."

This Court, in *Wetmore* v. *Markoe* (*supra*) 196 U. S. 68, at 77, said such a provision is

> "only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them against the husband and father."

This right was the wife's ancient common law right to support, and if necessary, to use the husband's credit for the purchase of necessities, no less and no more.

In

> *Magner* v. *Magner*, 144 N. Y. Misc. 740, at 742, 259 N. Y. Sup. 919, at 921,

the Court, in referring to a separation action, said:

> "The right to apply for alimony in such an action is a privilege incidental thereto, It is not obligatory on the wife to make such an application, and, unless she does so, that issue is not before the Supreme Court."

And see:

> *Varney* v. *Varney*, 178 N. Y. Misc. 165; 34 N. Y. Sup. 2d 155.

POINT V.

The respondent had no vested interest in the support provisions of the New York separation decree, ancillary thereto. The New York Supreme Court had power to modify that provision as to both future and past due alimony. The New York Court of Appeals misconstrued its own decisions in holding to the contrary in this case (296 N. Y. 308).

Chief Judge Loughran of the New York Court of Appeals in his opinion in this case said (p. 314):

> "In *Livingston* v. *Livingston*, 173 N. Y. 377, we held that alimony unconditionally and finally owing to a wife under a matrimonial decree is a vested property right of which she may not be deprived even by way of an act of the legislature."

We believe that this quotation was written by the learned Chief Judge inadvertently, because later cases cited by that Court clearly recognize that such is not now the law controlling alimony provisions in either divorce or separation decrees under the present New York statutes.

When the decree of absolute divorce was made in *Livingston* v. *Livingston* (*supra*) in 1892, the New York statutes gave no power to any Court to modify the support provisions it contained. In 1900, Section 1759, subd. 2, of the Code of Civil Procedure of New York was amended so as to permit a Court to amend such provisions "at any time after final judgment, whether heretofore or hereafter rendered."

The judgment of divorce in the *Livingston* case was one "heretofore" made, and the majority of the Court of Appeals was careful to limit their consideration of the case to that point.

The Court then held that as there had existed no power to alter the support provisions of the decree when it was made, the legislature was without power under the New York Constitution to later grant that power to any Court.

Nevertheless three judges dissented in an interesting opinion by Judge O'Brien (p. 384, etc.).

In this case the respondent's decree was made under a statute which reserved to the Court full power to modify either future or past due installments of alimony, to wit, Section 1170 of the New York Civil Practice Act, which reads as follows:

> "Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court, by order, upon the application of either party to the action, or any other person or party having the care, custody and control of said child or children pursuant to said final judgment or order, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, may annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires for the custody, care, education and maintenance of any such child or children or for the support of the plaintiff in such final judgment or order or orders."

Those provisions have been held valid in

Karlin v. *Karlin*, 280 N. Y. 32, 36,

and in

Fox v. *Fox*, 263 N. Y. 68, 70.

Livingston v. *Livingston* (*supra*) was said in the *Karlin* case to be no longer an authority, it having concern with a judgment entered before the above mentioned amendments.

Referring to the said section, Judge Loughran (who wrote the opinion in *Estin* v. *Estin, supra*) in *Karlin* v. *Karlin* (*supra*) quoted from *Fox* v. *Fox* (*supra*) as follows:

> "The effect of the statute is to write a reservation into every final judgment of divorce."

In the *Karlin* case, the defendant husband successfully obtained a reduction in the amount of alimony granted by the wife's divorce decree.

That reserved power extends to past due alimony as well as to the future.

In *VanDusen* v. *VanDusen*, 258 N. Y. App. Div. 1020; 17 N. Y. Sup. 2d 96, the Court in a *per curiam* opinion said:

> "The Court had authority under Section 1170, Civil Practice Act, to so modify the final judgment as to alimony past due or thereafter to become due."

This decision was followed in *Eisinger* v. *Eisinger*, 261 N. Y. App. Div. 1031, 26 N. Y. Sup. 2d 22, where arrears of alimony in the sum of $125 was reduced to $50, and future alimony was reduced from $20 to $15 per month.

This Court in *Wetmore* v. *Markoe,* 196 U. S. 68, at 75, cited *Livingston* v. *Livingston* and another case and said:

> "These cases do not modify the grounds upon which alimony is awarded and recognize that an alimony decree is a provision for the support of the wife settled and determined by the judgment of the court."

In *Wilson* v. *Hinman,* 182 N. Y. 408, at 410, Judge Cullen said:

> "Of course, alimony awarded on the dissolution of a marriage differs in one element from that on a separation; in the latter case the decree merely defines the continuous duty still existing on the part of the husband to support the wife, while in the former the marital obligation is terminated, and the sole liability of the husband towards the wife springs from the decree."

Referring to *Livingston* v. *Livingston,* 173 N. Y. 377, Judge Cullen said at page 411:

> "We have held that, where a divorce contained no reservation of the right to modify the award of alimony, the Court was without power to make such modification and that the legislature could not confer that power in the case of decrees entered prior to the enactment of the statute. We there held that the right of the plaintiff was a property right of which she could not be deprived. Those decisions, however, did not proceed on any theory that alimony was merely a debt; they recognized that the foundation for an award of alimony rested in the marital obligation of the husband's support, but

> held that the obligation theretofore indefinite, having been liquidated by the divorce decree at a specific sum, the adjudication was final."

The New York statute as construed by the New York State Courts therefore empowers the Court to modify and reduce both past due and future alimony under a separation decree of that state.

It is obvious that under the New York statutes as they now exist, that there is no vested right in a wife either as to past due alimony or as to future alimony. This Court in *Sistare* v. *Sistare*, 218 U. S. 1, 28 L. R. A.. new Series 1068, stated that as a general rule past due alimony accruing under a decree granting future alimony, become a vested right as to those arrears. The Court also said (p. 17):

> "this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested rights attaches to receive the instalments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due."

While the *Sistare* case recognized that in 1904 there was no such discretionary power reserved in the New York Courts, the statute has since been changed as above noted, and the New York cases above cited clearly recognize the changed situation.

The language used by Chief Judge Loughran in this case, quoted on page 13 of this brief, is unsupported by statute, is contrary to the decisions of that Court, to

his own opinion in *Karlin* v. *Karlin* (*supra*), to the decisions of the New York Appellate Division, and to the decisions of this Court.

As the New York statute now exists, no court of another state nor of the United States has power to entertain an action based upon past due alimony.

> *McGregor* v. *McGregor,* 52 Colo. 292;
> *Lockman* v. *Lockman,* 220 N. C. 95;
> *Bentley* v. *Calabrese,* 155 N. Y. Misc. 843.

The New York Court of Appeals recognized and applied that principle in *Lynde* v. *Lynde,* 162 N. Y. 425, affirmed in this Court in 181 U. S. 186.

The "Vested Interest" Doctrine.

We wish to emphasize that the doctrine of a "vested interest" in the support provisions of separation decrees and that service of process upon the wife within the jurisdiction of the foreign court, or that she subject herself thereto, is a necessary prerequisite to the termination of her rights thereunder when a later judgment of divorce is obtained against her in that foreign state, has arisen in the courts of New York State only since the first decision by this court in *Williams* v. *North Carolina,* 317 U. S. 287. As was said in *Russo* v. *Russo,* 62 N. Y. Sup. 2d 514 (not reported officially) at page 521:

> "That *Williams* v. *North Carolina* (No. 1) has devastated our public policy is obvious. Nevertheless we must survey the areas of possible salvage."

We have not overlooked the concurring opinions of Justice Douglas and Justice Rutledge in the *Esenwein* case. It is obvious that the New York Supreme Court in

this case took their view and endeavored to adopt it as applicable and that the New York Court of Appeals, although not citing their opinion, did the same.

We wish to emphasize that Mr. Justice Douglas in his "concurring" opinion in that case, did not discuss or refer to the historical and legal background or status of alimony provisions in separation decrees in New York. Had the principle underlying such awards and recognized by the New York Courts and by this Court been called to his attention, to wit,—that such provisions are based upon the continuance of the marriage relation, that such awards create no additional rights for the wife, that they are a procedural means for enforcing the husband's common law duty to support his wife, and that there is neither a common law power nor a New York Statute to continue such support when the marriage shall have terminated, we feel confident that their opinions would have been different.

The principle of law involved is much larger and of more importance than the litigation between Mr. and Mrs. Kreiger and between Mr. and Mrs. Estin. It affects the nation.

The New York Court of Appeals has refused to follow the decision in *Williams* v. *North Carolina* (*supra*) to its logical conclusion. Let us follow the decision of the New York Court of Appeals to its logical conclusion.

Mr. A. and his wife, residents of New York, are parties to a separation action in which Mrs. A. obtains a decree of separation in that state, with alimony, by reason of desertion. Mr. A. later goes to a distant state, *e. g.*, Arizona, of which he becomes a resident. Later he obtains information that grounds exist whereby he can obtain a divorce from his wife for adultery. He brings such an action in Arizona where he is domiciled. Mrs. A. is served with process in New York and defaults in appearing or pleading, and Mr. A. obtains his divorce upon

the ground stated. He ceases payment of alimony under the separation decree, and Mrs. A. makes her motion for a money judgment for the arrears which have accrued since Mr. A. obtained his divorce. Mr. A. opposes, relying on his Arizona divorce decree. The decision of the New York Court of Appeals in *Estin* v. *Estin* steps in and says to Mr. A., Mrs. A.'s right to alimony under her prior separation decree is not ended by your divorce for her adultery, as the Arizona Court never had jurisdiction over her person; hence, you must continue the alimony payments. §1172 C, New York Civil Practice Act, authorizes a modification of the alimony provisions of a divorce decree only for such conduct and then only if the wife is living openly with another man as his wife although not married to him. Occasional adultery is not enough.

And see:

Waddey v. *Waddey,* 168 N. Y. Misc. 904.

There is no half-way station.

In *Russo* v. *Russo* (*supra*), 62 N. Y. Sup. 2d 514 at 523 the Court said:

> "That a decree of divorce must be given acceptance for one purpose and denied acceptance for another, does not appeal to an orderly mind."

That comment is particularly true where the New York Courts hold that an alimony provision is valid only when made a part of the separation decree, but in the instant case hold that the termination of the subject matter of that decree, to wit, the marriage relation of the parties, leave in full force that alimony provision.

In *Herrick* v. *Herrick,* 55 Nevada 59, it was contended by Mrs. Herrick:

> "The Nevada five-year statute as applied by the lower Court would operate as an impairment of the obligation of contracts and deprive the wife of a vested right under the California decree.
>
> Appellant's contention that the decree of divorce in this case impairs the obligation of contract evidenced by the California decree of separate maintenance, is devoid of merit. The dissolution of the marriage relation extinguishes the subject matter which forms the basis of an action or proceeding for separate maintenance."

A divorce decree is obviously just as effective if lawfully based on separation without cohabitation as if based on adultery. If it is not, where is the line of difference to be drawn and by whom?

POINT VI.

No common law power exists in the New York courts to compel a man to support his ex-wife, and there is no such obligation created by statute applicable here.

Mr. Justice Hallinan says in his opinion in this case, 63 N. Y. Sup. 2d 476, unreported officially:

> "The State of New York had and continues to have an interest in the abandoned wife in whose favor its Courts have rendered judgment, who continues to reside within its borders, and who may become a public charge should the defendant be freed of his obligation to support her. Under these circumstances, this Court is not powerless and refuses to strike from its decree the provisions for the support of the plaintiff" (p. 484) (R. 89).

It seems clear that the learned Justice mistakenly assumed that the New York Courts have a common law power to direct a husband to continue to support a wife from whom he has been divorced.

In 17 Am. Jur., Divorce & Separation, §513, page 418, it is said:

> "In the case of an absolute divorce terminating the matrimonial ties, the duty of support no longer exists at common law, and in the absence of a statute continuing the obligation of maintenance beyond the dissolution of the marriage, it is difficult to find a basis for awarding permanent alimony."

The decision of the New York Court of Appeals in *Livingston* v. *Livingston*, 173 N. Y. 377, recognized this to be the law. The Court there did not deal with the alimony provisions of a separation decree, but with the alimony provisions of a divorce decree.

Judge Gray had this distinction in mind when he said (p. 381):

> "The marriage relation has been terminated by the decree. The wife has no future rights, and the husband is under no future obligations, such as are founded upon, or spring out of, the marriage relation. * * * The judgment defined and created a new obligation on his part * * *."

This basic difference in the principles underlying these two different types of cases was clearly emphasized in *Walker* v. *Walker*, 21 N. Y. App. Div. 226, where the Court said:

> "the plaintiff, prior to the decree, had a right of support; by her divorce, she lost that right and, in substitution for it, acquired a new right, a judg-

> ment requiring the payment to her of a specific sum of money."

The New York Court of Appeals in *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456, sets forth the history of the various legislative acts by which the power to award permanent alimony was conferred on our Courts, and notes that this power was first conferred in 1813.

In *Romaine* v. *Chauncey*, 129 N. Y. 566, at 571, the Court said, referring to alimony awarded by a divorce decree:

> "There is no doubt, of course, that the wife's right to alimony comes from statute and not from common law."

We have shown on the preceding Points that the respondent had no "vested interest" in the support provisions of her separation decree.

We have shown on Point IV that the alimony provision of a separation decree is designed to enforce the common law duty of the husband to support his wife and is based on the continuance of that obligation.

If, therefore, any power exists in our New York Courts to continue the alimony provision of the plaintiff's separation decree after her marriage with the defendant was dissolved by the Nevada Court, that power must be found in the statutes of this state.

We have searched carefully and can find no provision in the New York Statutes for the support of an ex-wife after a dissolution of the marriage, except in Section 1155 of the Civil Practice Act, when a divorce is granted to the wife, in Section 1140-a, when an annulment is granted a wife, and in Section 7.5 of the Domestic Relations Law, when a marriage is annulled on the ground that the wife has been incurably insane for a period of five years or more. Not one of those provisions is applicable here.

POINT VII.

The Nevada decree divorcing the petitioner terminated the obligation of the petitioner to pay for the support and maintenance of the respondent under her pre-existing separation decree granted by the New York Supreme Court, an obligation based upon his common law duty to support his wife.

The New York Court of Appeals in this case, 296 N. Y. 308, at 312, held:

> "The full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage" (R. 99).

The Court then by-passed the majority opinion of this Court in *Esenwein* v. *Commonwealth of Pennsylvania*, 325 U. S. 279. This case is very interesting in that, although the Court was unanimous in affirming judgment of the Pennsylvania Supreme Court, three of the Justices dissented from the majority as to the reason for the affirmance as well as from the reasons stated by the Supreme Court of Pennsylvania in that case (348 p. 455).

The prevailing opinion was written by Mr. Justice Frankfurter. The facts recited in that opinion are, briefly, as follows: In 1919, a husband and wife separated, and she obtained "a support order" (the equivalent of our New York separation decree), which was modified from time to time. In 1941, the husband went to Nevada, and obtained an uncontested divorce by default. He later applied to the Pennsylvania courts for total relief from the support order. He was defeated in the Pennsylvania courts and the United States Supreme Court granted certiorari. The prevailing or majority opinion, as written by Justice Frankfurter, then says:

> "This case involves the same problem as that which was considered in *Williams* v. *North Carolina*. * * *
>
> Since, according to Pennsylvania law, a support order does not survive divorce (citing cases) the efficacy of the Nevada divorce in Pennsylvania is the decisive question in the case. * * * The Full Faith and Credit Clause placed the Pennsylvania Courts under duty to accord *prima facie* validity to the Nevada decree."

The minority of this Court, in opinion by Justice Douglas, disagreed with this flat statement of the law to be applied to the facts before the Court.

Five Justices joined in the above quoted statement. The three Justices dissenting therefrom united in the minority opinion of Justice Douglas, and this opinion was quoted by Mr. Justice Hallinan of the New York Supreme Court in this case, 63 N. Y. S. 2d 476 at 485, in support of a theory which was not approved by the majority of this Court.

The reason for the affirmance of the Pennsylvania judgment as stated in the majority opinion was that the evidence in the case, like that in the second *Williams* v. *North Carolina* case, sustained a finding that the husband had not obtained a *bona fide* domicile in Nevada and thus the presumption of validity of the Nevada divorce decree was overcome. Mr. Esenwein's total stay in that state was about three and one-half months.

That the above quotation from the prevailing opinion was not written by Mr. Justice Frankfurter without due regard for the language used, is apparent later in his opinion, where he says:

> "The Pennsylvania Supreme Court rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day."

We believe it clear that the opinion of the majority of this Court is the one which states the rule which (the present case must control) in conformity with the law as fixed in *Williams* v. *North Carolina* (*supra*).

Chief Judge Loughran in his opinion in the *Estin* case, after disposing of the *Esenwein* case, said the decision of this Court in *Barber* v. *Barber,* 21 How. 582, to be "an authority much in point."

In several material respects the facts in that case essentially differ from those in the present case.

Mrs. Barber had obtained a separation decree with alimony in New York in the year 1846. At that time the law in New York was as recited in *Livingston* v. *Livingston,* 173 N. Y. 377 (*supra*), and no court had any power to modify the support provision of her decree. So it may have been argued that Mrs. Barber had a vested property right (improperly, we believe) and that was the reason for the language used in the quotation made by Judge Loughran at page 314 (296 N. Y.) of his opinion.

It also appears from the opinion in the *Barber* case that Mr. Barber had brought his divorce action in Wisconsin upon the grounds upon which he had been defeated in the New York separation action, but had concealed that fact from the Wisconsin Court. It was undoubtedly by reason of this concealment that the Court said at page 584:

> "Our first remark is—and we wish it to be remembered—that this is not a suit asking the Court for the allowance of alimony. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud."

It is clear that the purpose of the Court as expressed throughout the opinion was to defeat this fraud. Manifestly it was to especially emphasize this fact that the Court said "and we wish it to be remembered".

It is interesting to note that no authority was cited in *Barber* v. *Barber* to support the statement in the opinion which was quoted by Judge Loughran in *Estin* v. *Estin*. Also, that the lengthy opinion was devoted almost exclusively to the practice invoked by Mrs. Barber to overcome the effect of that fraud.

If this Court when it decided the *Barber* case in 1859 thought it was applying the New York law as to the effect of a divorce decree upon the alimony provisions of a prior separation decree, it neither said so nor cited any New York cases. If the New York Court of Appeals assumed that this Court was so applying New York law, it also cited no New York cases in support of that assumption.

We believe that *Barber* v. *Barber* is not an authority for the judgment of the New York Court of Appeals in *Estin* v. *Estin*, and hence not an authority supporting the judgment in the case now under consideration.

It is a well established and long recognized rule in New York State that a valid divorce decree ends the liability of a husband to pay the wife alimony under a prior separation decree. This is upon the ground that by the divorce the marriage between the parties was dissolved and that alimony is dependent upon the continued existence of the marriage relation, and the husband's common law duty to support his wife.

This rule was said to be applicable here by the two dissenting Justices of the Appellate Division of the New York Supreme Court (R. 62).

In *Solotoff* v. *Solotoff*, 51 N. Y. Supp. 2d 514, Mr. Justice Daly considered the effect of an Ohio divorce upon a judgment for alimony occurring prior to the entry of the divorce decree. He held that the plaintiff wife was entitled to a judgment for alimony from the date of the arrears to December 23, 1942, the date her husband obtained the divorce in the Ohio Court. He said:

"The decree of divorce granted to the defendant in the State of Ohio on December 23, 1942, in which action the plaintiff appeared, terminated her rights for alimony *pendente lite* in this state for all periods subsequent to that decree."

In *Scheinwald* v. *Scheinwald*, 231 App. Div. 757, 246 N. Y. S. 33 (Second Department), a divorce had been granted a husband in Nevada where the wife appeared and answered. That Court held that the rights of the wife to alimony under a prior separation decree granted in this state ended with the entry of the Nevada decree.

In *Richards* v. *Richards*, 87 Misc. Reports 134, 149 N. Y. Sup. 1028, Special Term, New York County, had before it a decree in a separation action awarding alimony to a wife, together with a subsequent divorce decree in favor of the husband rendered in Massachusetts. Subsequently a motion was made to punish the defendant husband in this state for contempt for failure to pay the alimony called for by the New York decree. The motion was granted only to the extent that alimony had accrued up to the date of the entry of the divorce action in Massachusetts.

Mr. Justice Donnelly said:

"We therefore have a valid judgment for separation from bed and board rendered in this state, bearing date March 15, 1912, and, for the purposes of this motion, a valid judgment for absolute divorce rendered in the State of Massachusetts, bearing date December 4, 1912. It has been held in this state that a judgment for absolute divorce will supersede a judgment for separation (*Tonjes* v. *Tonjes*, 14 App. Div. 542, 43 N. Y. Supp. 941; *Burton* v. *Burton*, 150 App. Div. 791, 135 N. Y. Supp. 248;

> *Gibson* v. *Gibson,* 81 Misc. Rep. 508, 148 N. Y. Supp. 37), and, as full faith and credit must be given to the Massachusetts judgment in every court within the United States, it follows that it supersedes the judgment for separation obtained in this state."

The only difference between the *Solotoff, Scheinwald* and *Richards* cases and the one at bar is that the wife appeared in those cases in the foreign state, while in the present case the wife was not served in Nevada nor did she appear in the action. She was personally served with the summons and complaint in New York.

Under the rule in *Haddock* v. *Haddock* (*supra*), this made the difference between a valid and an invalid decree, but when *Haddock* v. *Haddock* was expressly overruled in *Williams* v. *State of North Carolina,* the state of the residence of Mr. Kreiger, to wit, Nevada, obtained jurisdiction to grant a divorce.

Hence, those decisions above cited are squarely in point, not only that the valid divorce decree supersedes the separation decree, but in fixing the time when alimony under the separation decree ceased, to wit, the date of entry of the divorce decree in Nevada.

A valid default judgment is just as binding to its full extent as the same judgment made after a trial, or after an appearance by the defendant.

In *Tax Lien Co.* v. *Schultz,* 213 N. Y. 9, at 12, this Court said:

> "It is a general rule that a judgment is conclusive between the parties and their privies upon all matters embraced wherein the issues in the action which were or might have been litigated. It is immaterial whether issues are joined by an answer to the complaint or ordered by the plaintiff

and left unanswered. The rule applies as well to a judgment by default when the facts stated warrant the relief sought as to one rendered after a contest."

It necessarily follows that the rights of the parties, as husband and wife and the rights and duties dependent on the continuance of that status, were legally adjudicated as fully and completely in Mr. Kreiger's divorce action in Nevada as though Mrs. Kreiger had appeared therein and defended.

The New York Court of Appeals in this case, attempted to distinguish the case of *Scheinwald* v. *Scheinwald,* 231 N. Y. App. Div. 757, and *Richards* v. *Richards,* 87 N. Y. Misc. Rep. 134, from the *Estin* case by saying that in those cases the foreign court had jurisdiction of the persons of both parties, but that Mrs. Estin was never within the jurisdiction of the Nevada Court.

That Court erred, we believe, upon two grounds in so doing.

1st. Those cases and those heretofore cited on this brief fixed the law in New York prior to the decision of this Court in *Williams* v. *North Carolina,* just as firmly as ~~did~~ the case of *Com.* v. *Parker,* 59 Pa. Super. Ct. 74, and *Com.* v. *Kurniker,* 96 Pa. Super. Ct. 553, fixed the law in Pennsylvania as was stated in *Esenwein* v. *Pennsylvania* (*supra*).

Each of the *Scheinwald, Richards* and *Parker* cases considered a foreign divorce in which the defendant was either served with process within the jurisdiction of the foreign state or appeared or answered in the action. In the *Esenwein* case we find that Mrs. Esenwein was not served within the jurisdiction of the Nevada Court, neither did she appear nor answer therein. Hence those basic facts in that case, facts which the New York Court of

Appeals used to distinguish the *Estin* case from the *Scheinwald* and *Richards* cases and by inference from the *Parker* case, are the same as in the *Estin* case and this case.

Mr. Justice Frankfurter in the majority opinion in the *Esenwein* case, said:

> "Since, according to Pennsylvania law, a support order does not survive divorce" (citing the above Pennsylvania cases) "the efficacy of the Nevada divorce in Pennsylvania is the decisive question in the case."

and later he said:

> "The Pennsylvania Supreme Courts rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day."

The *Parker* case fixed the law in Pennsylvania that a valid divorce obtained in a foreign state ended the obligation of a husband to continue support or alimony payments under a prior judgment or decree, irrespective of the service of process within or without the jurisdiction of that state or whether the defendant wife appeared in the action. The same principle requires an adjudication that the *Scheinwald* and *Richards* cases fixed the law in New York as being the same.

The same rule of law is recognized in Nevada in *Herrick* v. *Herrick*, 55 Nev. 59, 68 2d.

2nd. The alimony award in the separation decree here was simply the petitioner's then common law duty to support Mrs. Kreiger while she remained his wife, measured by the Court in terms of dollars. That provision had of itself no power to perpetuate itself when the status ended upon which it was based and without which it could not exist. The common law obligation of Mr.

Kreiger to support Mrs. Kreiger was an integral part of the marriage status which was before the Nevada Court when he took there the "matrimonial res". The alimony provision of the decree was that duty called by another name, nothing less and nothing more. Manifestly, when the marriage status ended by the divorce that common law obligation translated into the alimony provision of the separation decree and depending for its existence upon an existing marriage, also ended.

The Courts of New York State have striven mightily to hamstring the decision of this Court in *Williams* v. *North Carolina* (1st).

That decision made meaningless the "public policy" of New York as respects the recognition of divorces obtained in other states.

That "public policy" was based on the principle that, if a husband and wife were domiciled in New York, neither by abandoning the other could take the "matrimonial res" to another state; it remained in New York.

> *Gibson* v. *Gibson,* 266 App. Div. 975; 44 N. Y. Sup. 2d 372.

In *Ellis* v. *Martin,* 53 Missouri 575, that Court defined the matrimonial *res* as

> "the *status* of the plaintiff in relation to the *defendant* to be acted on by the Court. This relation being before the Court in the person of the plaintiff, the Court acts on it, and dissolves it by a judgment of divorce."

When Mr. Estin, a *bona fide* resident of Nevada, went to the Court in that state and sued for a divorce, the matrimonial *res* went with him, and the decree of that Court dissolved the status which he and Mrs. Estin theretofore had borne to each other, that of husband and

wife. Had there been no prior separation decree, it is obvious that the divorce decree terminated any duty of Mr. Estin to support Mrs. Estin in the future.

> *Lambert* v. *Lambert,* 41 N. Y. Sup. 2d 841 (not reported officially).

It is logical that all rights and duties which depend for existence upon the continued status of husband and wife must cease when that status ends.

POINT VIII.

The authorities cited in this case by the New York Court of Appeals and by the New York Supreme Court are not in point and do not support the judgment here under review.

The opinion in the Court of Appeals states that the principle of *res judicata* (p. 313):

> "had no application whereas in the present case, the Court which granted the last judgment was without jurisdiction of the person of the defendant *cf. Miller* v. *Miller,* 200 Iowa 1193; *Wagster* v. *Wagster,* 193 Arkansas 902; 2 Freeman on Judgments (5th Ed.) §629", (R. 99)

and at page 314 further said:

> "in *Jackson* v. *Jackson* (290 N. Y. 512) we held that a Court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by his wife" (R. 100).

On pages 313 and 314 the Court considered at some length *Barber v. Barber* (21 How. [U. S.] 582) (R. 100).

Although the decisions in *Miller* v. *Miller* (*supra*) and *Wagster* v. *Wagster* (*supra*) may indicate that the Courts of Iowa and Arkansas take a similar view of the legal results of a foreign divorce as did the New York Court of Appeals, those views are wholly contrary to the view of the law as expressed by the Supreme Court of Pennsylvania in *Esenwein* v. *Esenwein*, 348 Pa. 455, by the Supreme Court of Alabama in *Harrison* v. *Harrison*, 20 Ala. 629, the Supreme Court of Michigan in *McCullough* v. *McCullough*, 203 Mich. 288, by the Supreme Court of California in *Cardinale* v. *Cardinale*, 8 Cal. 2d 762; 68 P. 2d 351, 352; and in the recent case of *Rodda* v. *Rodda*, decided by the Circuit Court of Oregon, County of Multnomah, June 27, 1947 (not yet reported).

In *Jackson* v. *Jackson* (*supra*) the New York Court of Appeals had before it a wife's right which was founded on a legal contract, and not her common law right to be supported by her husband based upon the status of husband and wife. That Court in *Severence* v. *Severence*, 260 N. Y. 432 affirmed an order that the alimony provision in a New York divorce decree be stricken out on the ground that the ex-wife had re-married (Section 1159 N. Y. Civil Practice Act) but directed that this was "without prejudice to the right of the plaintiff to seek relief under the provisions of the contract of December 12, 1925" (a separation agreement) thereby reserving the question of such rights to the future. Hence it is obvious that different principles of law control the two cases.

When the New York Supreme Court awarded judgment to Mrs. Estin in this case, Mr. Justice Hallinan (R. 81) cited *Durlacher* v. *Durlacher*, 123 F. 2d 70 and *Bassett* v. *Bassett*, 141 F. 2d 954, certiorari denied, 323 U. S. 718 as authorities that the alimony provision of Mrs. Estin's separation decree were not "automatically set aside by such divorce decree" (R. 87).

Those decisions were made while *Haddock* v. *Haddock*, 201 U. S. 631, was still the rule by which the legality of divorces such as the one here was determined. As the respondent in the New York Courts used these two cases as corner stones in her argument, and will undoubtedly do so here, we will now consider their applicability to the present case.

Durlacher v. *Durlacher*, 35 Fed. Sup. 1005, considered a case where a husband had obtained a divorce from his wife in Nevada, subsequent to the granting of a decree of separation in New York which awarded the plaintiff wife alimony. When the arrears of alimony accumulated, she made three successive and successful motions for judgments for the amount of arrears to the respective dates of the several motions. The husband appeared specially on the first two motions and objected to the jurisdiction of the Court. He was overruled and judgments were entered for the amount of the arrears, but the defendant took no appeal. He made no appearance in opposition to the application for the third judgment. After these judgments had been entered, the plaintiff brought suit in the United States District Court of the District of Nevada, to obtain a judgment based upon the New York judgments. The District Court granted judgment for the plaintiff as to the first two, but denied her judgment as to the third New York judgment in which the defendant defaulted.

An appeal was taken by the plaintiff to the Circuit Court of Appeals, which is reported in 123 F. 2nd 70. The opinion states that the only question is whether the New York judgments were subject to collateral attack. On page 71, the Court says:

> "Simon (the husband) does not rely on the District Court's finding but concedes here that the maintenance suit was commenced within the juris-

diction of the New York Court and that at the time the judgment here sued on was rendered that Court had jurisdiction *in personam* over him * * *.

Since the New York Supreme Court had acquired and retained jurisdiction *in personam* over Simon, he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal, that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance had terminated."

The New York Court having jurisdiction over the husband when it granted the third judgment, the Courts in Nevada were held bound to give it full faith and credit, and hence the merits of the case could not be collaterally attacked. The Circuit Court of Appeals therefore held that the plaintiff was entitled to her third judgment as well as to the first two allowed by the District Court.

The default judgment was held to be just as binding on the defendant as the two which were opposed.

Bassett v. *Bassett,* 141 Fed. 2d 954, shows similar facts. It was an action to enforce in Nevada judgments for arrears of alimony entered in an action in New York State. After the separation judgment had been obtained there, the husband obtained a divorce in Nevada. Mr. Bassett defaulted in the proceedings in New York to obtain the said money judgments.

The Court held that, as the New York Court had jurisdiction over Mr. Bassett, the judgments could not be collaterally attacked. The Court said (p. 955):

"In those (N. Y.) proceedings William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do. Had he appeared in the New York proceedings subsequent to the granting of the original decree and been un-

successful, his recourse would have been in the Appellate Courts of New York and in the Supreme Court of the United States."

To have the situation the same here, it would have been necessary for petitioner to have defaulted in the plaintiff's present motion for money judgment and await suit upon these judgments in Nevada. He would then have been met with the same situation as met the defendants in these two cases, to wit, he would be faced with a valid judgment in New York which had complete jurisdiction to grant said judgment and would therefore be unable to attack its merits in the State of Nevada.

It was to prevent any such situation arising that the petitioner opposed the plaintiff's motion for a judgment. He is following the practice outlined in the *Bassett* case.

It is clear, therefore, that the *Durlacher* and *Bassett* cases in the Federal Courts considered solely matters of practice, namely, the procedural method which Mr. Durlacher and Mr. Bassett had adopted when their ex-wives applied to the New York Courts for money judgments for arrears of money. Instead of opposing those applications in the New York Courts upon the merits both suffered judgments to be entered by default and attempted, when those judgments were sued on in the U. S. District Court in Nevada, to there defend the actions on the merits, which they had failed to do in New York. The U. S. Courts held that they could not go behind the New York Courts which had jurisdiction to grant the judgments, and that Mr. Durlacher and Mr. Bassett should have followed the practice adopted by the petitioner here, to wit: oppose the New York applications on the merits and, if unsuccessful, appealing through the New York Appellate Courts to this Court.

POINT IX.

No Separation Agreement Is Involved in This Action.

Mr. Justice Hallinan in his opinion (R. 82), refers to a finding by the Official Referee in the separation action "that the plaintiff and the defendant have entered into a separation agreement dated March 16, 1943, as amended by a stipulation dated April 1, 1943, and further amended by a letter dated April 12, 1943."

These papers are printed at R. 14 to 22. It is clear that these are not a separation agreement but a stipulation "subject to the approval of the court" (R. 15). An examination of the separation decree shows that the only provision of this stipulation included in the decree is the provision for $180 a month for respondent's support (R. 13).

The opinion later refers to this clause in the following language (R. 88):

> "• • • it is clear that the support and maintenance which was provided in the decree was based upon the agreement of the parties and did not result from an adjudication of that question by the court upon conflicting proof. It is difficult to perceive how the property rights thus established in plaintiff's favor could be wiped out by the subsequent decree of divorce obtained in a sister state by one of the parties to the agreement without the presence of or appearance by the other therein."

In making this comment, the learned Justice was clearly mistaken and his argument was ignored by the Court of Appeals in its opinion.

That stipulation was expressly subject to the approval of the court and obviously was made to save the time of

the court in receiving and considering evidence of the income, wealth, etc. of Mr. Estin.

A similar decree was before the New York Supreme Court in *Addis* v. *Addis*, 73 N. Y. Sup. 2d 843 (not reported officially). Mr. Justice Froessel said:

> "I am satisfied that the parties in this case prepared such stipulation and agreement simply to avoid the necessity of adducing evidence at the inquest, and for the purpose of aiding the court, and that they intended that the terms of said stipulation, at least so far as alimony and support were concerned, were to merge in the decree and were not to survive it."

It is apparent that the New York Court of Appeals took that view of the stipulation and did not consider the comment of Justice Hallinan merited consideration.

Conclusion.

For the above reasons, we respectfully submit that the judgment of the Court of Appeals should be reversed, the courts of New York State be directed to deny the respondent's motion made in the New York Supreme Court for a money judgment for alimony accruing since the entry of the Nevada decree divorcing the parties, the petitioner should be granted such other relief as may be proper in the premises and be awarded the proper costs pursuant to statute and the rules of this Court.

Respectfully submitted,

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